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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1932

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, PETITIONER

v.

NORTH GERMAN LLOYD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, petitioner

v.

NORTH GERMAN LLOYD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the District Court for the Southern District of New York, granting the respondent's motion for summary judgment, appears at R. 15. The opinions of the Circuit Court of Appeals (R. 19–21) are reported in 54 F. (2d) 997.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 18, 1932. (R. 21.) The petition for certiorari was filed April 18 and granted May 23, 1932, 286 U. S. 538. (R. 22.) The juris-

diction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a fine may be imposed by the Secretary of Labor upon a steamship company under Section 6 of the Quota Act of 1921, as amended, for bringing to this country an alien who claimed exemption from the quota restrictions on the ground that he was coming as a temporary visitor and who possessed an American consular visa which indicated that he was exempt from the quota, but who, on arrival, was found by the immigration officials to be a quota immigrant brought to the United States in excess of the quota limitations, and who was excluded on such ground.

2. Whether a fine imposed upon the respondent under Section 6, as amended, for bringing to the United States an alien not admissible under that Act may be recovered from the Collector of Customs when the Secretary of Labor has not been satisfied that the inadmissibility of such alien "was not known to, and could not have been ascertained by the exercise of reasonable diligence by" the respondent, and has refused to remit the fine.

3. Whether the refusal of the Secretary to refund the fine was arbitrary or capricious.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 35–40.

STATEMENT

This is a suit by the respondent to recover from the Collector of Customs a fine imposed upon it by the Secretary of Labor under Section 6 of the Quota Act of 1921, as amended by the Act of May 11, 1922, pp. 35–36, *infra,* for bringing to the United States an alien who was inadmissible under that Act. The case was submitted to the District Court upon the pleadings and upon motions for summary judgment by both parties, together with certain affidavits and exhibits. (R. 15.) The following facts appear to be undisputed:

On February 14, 1924, the respondent brought to the United States on its steamship "Bremen" the German alien, Joseph Funk. (R. 2, 4, 7, 12.) At the time of his embarkation the alien represented to the respondent that he was going to the United States on a temporary visit for the purpose of collecting an inheritance (R. 3), and he was in possession of a passport visa, issued to him on January 24, 1924, by the United States consul at Munich, bearing the notation "purpose to proceed to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration Law." (R. 3, 7.) Apparently, the visa was obtained by fraudulent statements of the immigrant. (R. 15.)

Upon arrival in the United States the alien was detained by the immigration officials at Ellis Island, and a hearing was had before a Board of Special Inquiry, which refused to accept the alien's claim that he was visiting the United States tempo-

rarily for business or pleasure. He was thereupon ordered excluded and deported on the ground that he was a quota immigrant and that the quota applicable to his nationality was then exhausted. (R. 2, 12–14.) The action of the Board was based upon the following grounds: The alien arrived without money or a return ticket; his passage had been paid by a relative in this country; he claimed to be coming to the United States to collect an inheritance of $400, but it cost him nearly half that amount to come here and he had no documentary evidence to support this claim; and he stated that there was no reason why he could not remain permanently in this country. (R. 8, 13.)

The respondent was notified by the Secretary of Labor that the ascertained facts indicated its liability to a fine of $200, plus $110 paid by the alien for passage, for bringing to the United States a quota immigrant in excess of the quota, and that it would be allowed sixty days in which to submit evidence and be heard. In order to secure clearance for its vessel, the respondent deposited with the Collector, under protest, the amount of the fine and passage money. (R. 4, 13.) The respondent thereafter filed a protest against the imposition of the fine (R. 2, 10) on the ground that the respondent had accepted the alien for transportation in good faith in reliance upon the consular visa and the notation thereon. (R. 4, 6, 12.) There is no evidence that the respondent made any inquiry as to the truth of the alien's claim to be a temporary

visitor to the United States for the purpose of collecting an inheritance. (R. 8, 9, 11, 19.)

After a hearing, and a rehearing, the Commissioner General and the Secretary of Labor ruled that "no claim can be made, consistently, that reasonable diligence was exercised" by the respondent to ascertain whether the alien was admissible, and that his "inadmissibility could have been determined prior to his embarkation, through the exercise of a reasonable amount of diligence." (R. 8, 9, 12.) The respondent paid the fine under protest. (R. 3, 8, 10, 13.)

Judgment was entered by the District Court in favor of the respondent for $423.15 and costs, taxed at $20 (R. 16), and a certificate of probable cause was issued under R. S. 989 (R. 17). Upon appeal the judgment was affirmed by the Circuit Court of Appeals, Judge L. Hand dissenting. (R. 19–21.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In affirming judgment in favor of the respondent.

2. In failing to hold that the refusal of the Secretary of Labor to remit the fine was conclusive; and that the fine was legally imposed.

3. In holding that the consular visa and notation thereon justified the respondent in bringing the alien to the United States without investigation as to his true status, and that the fine was illegally imposed.

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SUMMARY OF ARGUMENT

I

The fine was legally imposed. Under the first sentence of Section 6 of the Quota Act of 1921, as amended, it was unlawful for any transportation company to bring to the United States any alien not admissible under that Act, and a penalty of $200 was made payable by such company "if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought * * *." In the instant case, the respondent brought to the United States an alien who was inadmissible under the Quota Act, and this fact appeared to the satisfaction of the Secretary. Accordingly, the fine was legally imposed, and the only other question is whether it should have been remitted under the third sentence of Section 6, which provided that—

> Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence * * * prior to the departure of the vessel.

Even if the first and third sentences of Section 6 be so construed as to impose liability for a penalty only upon a finding by the Secretary that the inadmissibility of the alien could not have been ascertained by the exercise of reasonable diligence, the fine in the instant case was legally imposed

since the Secretary found that the respondent could have ascertained that the alien was inadmissible by the exercise of reasonable diligence.

There is no basis for the holding of the Circuit Court of Appeals that Section 6 does not apply to the transportation in good faith of an alien who proves to be inadmissible but whose inadmissibility can be determined with certainty only upon his arrival in the United States. The penalty is predicated upon the bringing to this country of an inadmissible alien, and there is nothing in the statute which exonerates a steamship company from liability because it transported the alien in good faith, or because it had probable cause to believe that the alien was admissible, or because the question of admissibility could be answered with certainty only at the port of arrival.

Even if the statute is construed as imposing liability only if the Secretary finds that the inadmissibility of the alien could have been ascertained by the exercise of reasonable diligence, there is no basis for holding that Section 6 is inapplicable in any case where it can not be known with certainty prior to embarkation that the alien is inadmissible. In the majority of cases diligent inquiry will disclose facts from which it will clearly appear whether or not the alien is admissible, and the carrier may act accordingly. If, in some cases, of which the case at bar is not one, a careful inquiry only discloses facts which leave the question of admissibility in doubt,

we submit that the steamship company acts at its peril if it transports the alien and he is eventually held to be inadmissible. In such a case the company's only redress is an appeal to the discretionary power of the Secretary to remit the fine.

II

The determination of the Secretary that the fine should not be remitted is not subject to judicial review, at least in the absence of a manifest abuse of discretion. The statute expressly declares that no fine shall be refunded unless certain facts appear "to the satisfaction of the Secretary." This Court has said with respect to similar language in a prior immigration law that the power thus lodged in the Secretary "was intended to be exclusive." *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 333.

The instant case is closely analogous to those cases involving the power of the Secretary of the Treasury to remit penalties and forfeitures under the customs and internal revenue laws in cases where he is satisfied as to the lack of fraudulent intent or negligence on the part of the person incurring the penalty or interested in the seized article. These cases hold that the discretion of the Secretary to remit the penalty can not be revised or controlled by the courts.

Even if Section 6 be construed so as to impose liabilty only upon a finding by the Secretary that the steamship company could have ascertained that the alien was inadmissible by the exercise of rea-

sonable diligence, judicial review of the Secretary's action exists only if he has abused his discretion. This Court has frequently pointed out that the administration of the immigration laws has been committed to the Secretary of Labor and that in such administration his findings of fact, within the scope of his authority, are final, unless they are arbitrary or capricious.

III

The refusal of the Secretary to remit the fine was not arbitrary or capricious.

In accepting the alien for transportation the respondent did not make any independent inquiry as to the alien's claim to be a temporary visitor for business purposes, but relied solely upon his possession of a consular visa. Upon arrival in the United States the immigration officials ascertained that the alien was without money or a return ticket, that his passage had been paid by a relative in the United States, and that there was no reason why he could not permanently remain here. Although the alien claimed he had come to this country to collect an inheritance of $400, it cost him nearly half that amount to come to the United States, and he had no documentary evidence whatever to support his claim. Upon these facts he was held not to be a temporary visitor for business purposes and was excluded. The respondent was notified of the proposed fine and given sixty days in which to have a hearing. After a consideration of the proceedings

at Ellis Island and of the respondent's protest, in which it asserted that it had accepted the alien for transportation in good faith in reliance upon the visa, the Secretary determined that the inadmissibility of the alien could have been determined by the respondent prior to embarkation by the exercise of reasonable diligence.

These facts plainly establish that the Secretary did not deny a fair hearing, and that his decision was based upon substantial evidence.

The respondent was not excused from making an independent inquiry as to the alien's status by reason of his possession of a consular visa, which indicated that he was exempt from the quota restrictions, since under the applicable laws and regulations the visa was in no sense a guarantee of the alien's admissibility.

ARGUMENT

I

THE FINE WAS LEGALLY IMPOSED

By Section 2 (a) (4) of the Quota Act of 1921 (p. 35, *infra*) an alien "visiting the United States * * * temporarily for business or pleasure" was exempted from the quota restrictions of that Act,[1] and therefore was entitled to enter the United States, if otherwise admissible, even though

[1] Such an immigrant is sometimes referred to herein as a "nonquota immigrant," although that term was not introduced in the immigration statutes until the Immigration Act of 1924, c. 190, 43 Stat. 153.

the quota of his nationality was exhausted. The alien in the instant case claimed, upon embarkation, to be such an immigrant, and, apparently as a result of fraudulent representations, secured from the United States consul a visa which characterized him as such. Upon arrival he was found by the authorities at Ellis Island not to be visiting the United States "temporarily for business or pleasure" and, since the applicable quota was then exhausted, he was excluded and deported as a quota immigrant brought here in excess of the quota restrictions.[2]

The first sentence of Section 6 of the Quota Act of 1921, as amended by the Act of May 11, 1922,[3] pp. 35–36, *infra*, provided:

> That it shall be unlawful for any person, * * * to bring to the United States * * * any alien not admissible under the terms of this Act or regulations made there-

[2] The power of the immigration authorities to exclude the alien, notwithstanding his possession of the consular visa, indicating that he was exempt from the quota, is clear (*United States ex rel. Spinoza* v. *Curran*, 4 F. (2d) 613 (E. D. N. Y.), affirmed, 4 F. (2d) 614 (C. C. A. 2d), and no attack is made upon the finding of the authorities that the alien was not admissible. See *Chang Chan* v. *Nagle*, 268 U. S. 346.

[3] The Quota Act of 1921, as amended, expired on June 30, 1924. Section 6 thereof, above quoted, was replaced by Section 16 of the Immigration Act of 1924. (U. S. C., Title 8, Sec. 216.) Although there is some change in the language, the provisions of Section 16 of the 1924 Act with respect to the imposition and remission of the penalty seem to be substantially identical with those of Section 6 of the 1921 Act. See pp. 37–38, *infra*. The changes in the phraseology of Section 16 were required by reason of the

> under, and if it appears *to the satisfaction of the Secretary of Labor* that any alien has been so brought, such person * * * shall pay to the collector of customs * * * the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation * * * such latter sum to be delivered * * * to the alien * * *. (Italics ours.)

The third sentence of Section 6 provided:

> Such fine shall not be remitted or refunded unless it appears *to the satisfaction of the Secretary of Labor* that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such person * * * prior to the departure of the vessel * * *. (Italics ours.)

In the instant case the respondent was notified by the Secretary of Labor that the facts indicated its liability to a fine of $200, plus the alien's passage money, for bringing to the United States an immigrant in excess of the quota, and was given sixty

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altogether new system of "quota" and "nonquota" immigration visas inaugurated by the 1924 Act. (See Annual Report of the Secretary of Labor for 1924, p. 52; House Report No. 350, 68th Cong., 1st Sess.; House Rept. No. 1621, 67th Cong., 4th Sess.) The basis for the penalty was changed. Under the 1921 Act the penalty was imposed for bringing to this country an alien who was inadmissible under that Act; under Section 16 of the 1924 Act the penalty is imposed for bringing to the United States (1) any immigrant without an unexpired visa, and (2) any quota immigrant who has a nonquota visa.

days in which to have a hearing. In order to secure clearance for its vessel the respondent deposited with the Collector, under protest, the amount of the fine and passage money. The respondent thereafter filed a protest against the imposition of the fine, stating that it had accepted the alien for transportation in good faith and in reliance upon the consular visa which indicated that he was exempt from the quota restrictions. After a hearing the Secretary determined that the inadmissibility of the alien could have been ascertained by the respondent prior to embarkation by the exercise of reasonable diligence, and accordingly he refused to remit the fine. (See pp. 3–5, *supra*.)

We contend, first, that under these facts the fine was legally imposed. The language of the statute is clear. If a carrier brings to the United States an alien who is inadmissible under the statute, and if that fact appears to the satisfaction of the Secretary of Labor, imposition of the fine follows. No other facts are necessary elements of the liability.[4] In the instant case the facts upon which statutory liability for the fine is predicated are not in dispute, it being conceded that the respondent brought to the United States an alien who was inadmissible, and that such fact appeared to the satisfaction of the Secretary. Accordingly, liability for the fine was incurred under the express provisions of the statute.

[4] That such a statutory provision is constitutional is clear. *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320.

The only question remaining is whether the fine should have been remitted under the third sentence of Section 6, above quoted. On this point the statute is equally explicit. The fine shall not be remitted or refunded unless it "appears to the satisfaction of the Secretary" that the inadmissibility of the alien could not have been ascertained by the respondent, prior to embarkation, by the exercise of reasonable diligence. In the instant case the Secretary determined that the respondent could have ascertained that the alien was inadmissible by the exercise of reasonable diligence. Accordingly, there is no basis for the assertion that the fine should have been remitted or refunded, unless the decision of the Secretary is subject to review by the courts. As to this, we contend that the Secretary's decision was final. See Point II, pp. 21–29, *infra*.)

It may be suggested that the first and third sentences of Section 6 should be read together, that looking at the section as a whole Congress did not intend any steamship company to be penalized if it had exercised reasonable diligence in endeavoring to ascertain whether the alien was admissible, and that, accordingly, no liability for a fine can be *incurred* unless the Secretary finds that the inadmissibility of the alien could have been ascertained by the exercise of reasonable diligence. We submit that this construction requires an alteration and rearrangement of the language of Section 6 which is wholly unwarranted in view of the plain

wording of that section. When the statute plainly directs that the fine shall be payable if the Secretary finds that the steamship company has brought an inadmissible alien to the United States, the rules of statutory construction afford no authority for holding that the fine shall be payable only if the steamship company fails to use due care in investigating the question of the admissibility of the alien. There is a clear distinction between the *imposition* of a fine and its *remission* or *refund*, and this distinction is made by the statute in unambiguous terms.

Moreover, the suggested construction is contradicted by the legislative history of the statute. Section 6 was not in the Quota Act of 1921, as originally enacted. It was added thereto by Section 3 of the Act of May 11, 1922, c. 187, 42 Stat. 540. (Pp. 35–36, *infra*.) Section 3 of the latter Act, as originally introduced in Congress, imposed a fine upon any person for bringing to the United States an alien who was inadmissible under the statute and ended with the following clause: "and such fine shall not be remitted or refunded." In conference the words quoted were deleted and what is now the third sentence of Section 6 was inserted. (See House Report No. 945, 67th Cong., 2d Sess.) The fact that the provision for the *remission* or *refund* of the fine was inserted subsequently to and separately from the provision providing for the *imposition* of the fine would seem to negative the contention that the statute should be read so as

to impose liability only in the event of a finding by the Secretary of the existence of facts upon which he is authorized to remit or refund the fine.

But even if Section 6 be construed as suggested the disposition of the instant case would not be affected. Under such construction the imposition of the fine would be predicated upon precisely the same test as is the remission of the fine under what we believe is the correct construction of the statute, namely, the appearance of certain facts to the satisfaction of the Secretary of Labor. In the case at bar the Secretary has been satisfied as to the existence of the requisite facts, and so, on either theory of construction, the fine must be regarded as being legally imposed. While possibly the courts might exercise a wider review of an administrative determination of facts upon which the *liability* to a fine is predicated than of a like determination of facts upon which the *remission* or *refund* of a fine is based, it is clear that even in the former case the decision of the Secretary is final unless it be shown that he made an erroneous application of the law, or denied a fair hearing, or that his decision was not based upon any substantial evidence. (Point II, pp. 21–29, *infra.*)

The majority of the Circuit Court of Appeals does not seem to controvert, directly at least, the conclusions above stated, but holds rather that Section 6 is inapplicable to the instant case, and that

therefore the fine was illegal. After pointing out that the alien's admissibility turned on whether or not he was "visiting the United States * * * temporarily for business," and that the only way his admissibility could be finally determined was by "coming to some port of entry to the United States to present his evidence of his right to enter," the court held that "the statute does not forbid bringing such an alien here so that he can satisfy the proper authorities, if possible, that he has a right to enter," and that "a transportation company acting in good faith is not liable to a fine for bringing him here for such a purpose."[5] We submit that this interpretation of the statute is unfounded.

Section 6 does not exonerate from liability a steamship company which brings to this country an inadmissible alien whenever the company can establish that it acted in good faith, or that it had probable cause to believe that the alien was admissible, or whenever the question of admissibility can only be answered with certainty by immigration officials at the port of arrival. Nor does the statute furnish exemption from liability whenever the alien has succeeded in persuading a United States consul that he is admissible and has secured a visa which

[5] It should be noted that the decision did not rest upon the fact of the alien's possession of a consular visa. The court expressly stated that the respondent had no right to rely upon the visa as establishing the status of the alien (R. 20), but was of the opinion that the visa established the good faith of the respondent by giving it probable cause to believe that the alien was admissible. (See pp. 31–33, *infra*.)

so indicates. The statute makes it unlawful "to bring to the United States * * * any alien not admissible under the terms of this Act," and makes the fine payable "if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought." The test is whether the alien was admissible, not whether the steamship company had reason to believe that he was.

Even assuming that the liability for the fine is not predicated upon the bringing to this country of an inadmissible alien, but upon the failure of the steamship company to exercise reasonable diligence,[6] there is no foundation for the conclusion that a fine may not be imposed in any case where it can not be determined with certainty prior to embarkation whether the alien is admissible.

Upon the assumption stated, the test of liability would be whether or not—

> it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence * * *.

The only aliens who are inadmissible under the Quota Act of 1921 are those brought to this country in excess of the quota. Such aliens are of two classes: (1) Aliens admittedly subject to the quota who are transported in the expectation that they will reach the United States prior to the exhaustion

[6] This is apparently the view of the court below, although it does not so state expressly.

of the quota; (2) aliens who claim to be wholly exempt from the quota restrictions but who, upon arrival, with the quota exhausted, are found to be subject to the quota. In the case of *every* alien of the second class, and in the case of *most* aliens of the first class (the only exceptions being where the carrier knows in advance of sailing that the quota is exhausted, in which case no carrier would be so unwise as to transport the alien), final decision as to admissibility or definite knowledge as to admissibility can be made or secured only at the port of arrival.[7] Moreover, at the time of the transaction here involved, as at the present time, any alien arriving in the United States, although plainly inadmissible, possessed the chance of temporary admission under Section 3 (q) of the Immigration Act of 1917. (U. S. C., Title 8, Sec. 136 (q).)[8] Accordingly, if the view of the statute suggested above is accepted the penalty provisions of Section 6 will have practically no application or meaning whatever. If any alien, no matter how doubtful his chances of admission, has the right to present his

[7] See the consular instructions which were in force at the time of the transaction here involved (pp. 38–39, *infra*).

[8] *Lloyd Sabaudo Societa Anonima per Arizoni* v. *Elting*, 55 F. (2d) 1048 (C. C. A. (2d), holds that no fine may be imposed where the alien is actually admitted, even though he is admitted but temporarily. Under the present Immigration Rules, aliens in certain excludable classes can not take advantage of this provision for temporary admission unless permission has been secured prior to departure from abroad. See Immigration Rules of January 1, 1930, Rule 13, (B) (2).

claim to officials in this country, and if any steamship company which can not know definitely prior to embarkation (1) whether such alien is subject to the quota, or (2) whether he will arrive prior to the exhaustion of the quota, may carry the alien to this country without penalty, even though he be eventually excluded, Section 6 is practically nullified.

But the statute need not be given so futile a construction. In the vast majority of cases reasonable diligence by the steamship company will disclose facts from which it will clearly appear whether the alien is exempt from or subject to the quota, and the steamship company may act accordingly. But Congress, solicitous that penalties incurred without fault should not be enforced, provided for remission of the penalty by the Secretary and at the same time limited his authority to cases where with reasonable diligence the inadmissibility could not have been ascertained. Of course, "the burden of proof" is "upon the steamship companies" (House Rept. No. 945, 67th Cong., 2d Sess., p. 3) to demonstrate to the satisfaction of the Secretary that they exercised reasonable diligence. Conceivably there may be cases of which the instant case is not one,* in which diligent inquiry by the steamship company will only disclose facts which leave the question of admissibility in doubt. But

* The respondent made no investigation at all, and the facts, as ascertained at Ellis Island, indicated clearly that the alien was inadmissible. (See pp. 29–31, *infra*.)

even in such cases we submit that the statute requires the steamship company to act at its peril if, doubting admissibility, it transports the alien. That the burden of diligent investigation imposed upon the steamship companies is heavy may be conceded. Doubtless it was in recognition of this that Congress vested the Secretary of Labor with discretionary power to remit the penalty. The possibility of difficulties in the administration of Section 6 was considered at some length in the debates in Congress, but the members who discussed the proposed statute seemed to be uniform in their belief that the Secretary could be trusted to exercise a wise and reasonable discretion.[10] The steamship companies must rely, as has Congress, upon the fairness of the administrative official charged with the enforcement of the law.

II

THE DETERMINATION OF THE SECRETARY THAT THE FINE SHOULD NOT BE REMITTED OR REFUNDED IS NOT SUBJECT TO JUDICIAL REVIEW, AT LEAST IN THE ABSENCE OF A MANIFEST ABUSE OF DISCRETION OR CLEARLY ARBITRARY ACTION

If the fine was legally imposed, a further question is whether it should have been remitted or refunded by the Secretary under the third sentence of Section 6, pp. 35–36, *infra*. As to this question, the petitioner contends that the Secretary's decision not to remit the fine is final, and that it can not be reviewed by the courts, at least in the absence of man-

[10] See Congressional Record, Vol. 62, pp. 6207, 6237.

ifestly arbitrary or capricious action. To be entitled to recover, the respondent must show not only that the fine ought to be refunded "but that the United States, by the only voice authorized to express its will, has said so." (See *Polymeris* v. *Trudell,* 284 U. S. 279, 281.)

In unambiguous language the refund of the fine is predicated upon the appearance of certain facts "to the satisfaction of the Secretary of Labor." Moreover, the statute does not direct that the Secretary *shall* remit or refund the fine if the requisite facts appear, but declares that *no fine shall be remitted or refunded unless the requisite facts appear.* This language, which is in the form of a limitation upon the power of the Secretary, leaves no doubt of the legislative intent to vest in the Secretary the *sole* right to determine whether any fine for which liability has been incurred shall be remitted or refunded. As was stated in *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 333, where this Court dealt with the almost identical language of Section 9 of the Immigration Act of 1903, the power thus lodged in the Secretary "was intended to be exclusive." There this Court stated that the finding of the Secretary, based upon the certificate of the local medical officers that the alien was afflicted with a contagious disease, the existence of which could have been detected at the time of embarkation, was so absolute that the carrier might be deprived of a hearing. (214 U. S. 320, 342–343.)

The power of the Secretary of Labor to remit the penalty incurred is analogous to the power of the Secretary of the Treasury to remit certain penalties and forfeitures under the customs and internal revenue laws when satisfied as to the lack of fraudulent intent or negligence on the part of the person incurring the penalty or interested in the seized article. Such discretion can not be revised or controlled by the courts. *Dorsheimer* v. *United States,* 7 Wall. 166; *United States* v. *Morris,* 10 Wheat. 246, 284–285; *United States ex rel. Walter E. Heller & Co.* v. *Mellon,* 40 F. (2d) 808 (App. D. C.), certiorari denied, 281 U. S. 766; *General Finance Co.* v. *United States,* 45 F. (2d) 380 (C. C. A. 5th); *Macheca* v. *United States,* 26 Fed. 845 (C. C. La.); *In re Commercial Inv. Trust Corporation,* 31 F. (2d) 494 (W. D. N. Y.). See *The Pilot,* 43 F. (2d) 491, 493 (C. C. A. 4th); *McCarl* v. *Walters,* 38 F. (2d) 942 (App. D. C.).

In the *Dorsheimer* case this Court said (p. 174):

> The power intrusted by law to the secretary was not a judicial one, but one of *mercy,* to mitigate the severity of the law. It admitted of no appeal to the Court of Claims, or to any other court.

A like view was expressed by this Court in the *Morris* case, *supra,* where the Court said (p. 285):

> The law declares that * * * he shall have power to mitigate or remit such fine, forfeiture or penalty, * * * if, in his opinion, the same shall have been incurred

> without wilful negligence, or any intention of fraud * * *. The facts are submitted to the secretary, for the sole purpose of enabling him to form an opinion, * * * and the correctness of his conclusion therefrom, no one can question. * * * It would be a singular issue to present to a jury for trial, whether the facts contained in such statement were sufficient or not to satisfy the secretary of the treasury, that there was no wilful negligence or intentional fraud. * * *

Statutory provisions closely similar to those involved in the instant case have frequently been held to invest administrative officials with a discretionary power which is not subject to judicial review. Thus, the decision of the Commissioner of Internal Revenue that a taxpayer is not entitled to a "special assessment" of its excess profits taxes under the Revenue Act of 1918 may not be challenged in the courts, "at least in the absence of fraud or other irregularities." *Williamsport Co.* v. *United States,* 277 U. S. 551, 562; *Duquesne Steel Foundry Co.* v. *Burnet,* 283 U. S. 799. The Director of the Veterans Bureau has exclusive authority to pass upon all claims for compensation under the Adjusted Compensation Act. *United States* v. *Williams,* 278 U. S. 255. The action of the Postmaster General in issuing fraud orders under the postal laws relating to lotteries will not be reviewed by the courts, unless it appears that he has

exceeded his statutory authority. *Public Clearing House* v. *Coyne,* 194 U. S. 497. And the courts have no control by mandamus or injunction over the decisions of the Secretary of the Interior under the public lands laws in a matter involving the exercise of his judgment and discretion, even though that matter involve the construction of a statute. *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Work* v. *Rives,* 267 U. S. 175.

If, as we contend, the fine is incurred upon the bringing of an inadmissible alien to the United States, then, under the decisions just cited, the Secretary's decision not to remit the fine may not be disturbed by the courts. If Section 6 be construed so as to impose liability only upon the condition precedent of a finding by the Secretary that the carrier could have ascertained that the alien was inadmissible by the exercise of reasonable diligence, which finding was made in the instant case, it may be that the courts possess a limited power of review if, and only if, it appears that the Secretary denied a fair hearing, or made an erroneous application of the statute, or that his decision was not based upon any substantial evidence.

This Court has frequently pointed out that the administration of the immigration laws has been committed to the Secretary of Labor, and has held that in such administration his findings of fact, within the scope of his authority, are final unless arbitrary or capricious, and his discretion will not

be interfered with unless an abuse thereof is shown. *Polymeris* v. *Trudell,* 284 U. S. 279; *Quon Quon Poy* v. *Johnson,* 273 U. S. 352; *Ng Fung Ho* v. *White,* 259 U. S. 276; *United States* v. *Ju Toy,* 198 U. S. 253. These decisions are peculiarly applicable to the instant case in view of the specific provision of the statute that the determining facts must be demonstrated "to the satisfaction of the Secretary."

The various provisions of the immigration laws imposing penalties upon steamship companies for bringing diseased, defective, or otherwise inadmissible aliens to the United States [11] have frequently been before the Federal courts, particularly those of the Second Circuit. In construing these provi-

[11] In addition to the statute involved in the instant case, and its successor statute, Section 16 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 216), see Section 9 of the Immigration Act of 1917, as amended by Section 26 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 145). The language used in Section 9 with respect to the various penalties thereby imposed is substantially the same, in each case liability being predicated upon the appearance of certain facts "to the satisfaction of the Secretary of Labor."

One important distinction should be noted. In cases arising under the first two sentences of Section 6 of the Quota Act of 1921, and under Section 16 of the 1924 Act, as we construe those sections, *two* questions may arise, i. e. (1) was the fine legally imposed, and (2) should the fine be refunded. In cases arising under Section 9 of the 1917 Act, as amended by Section 26 of the 1924 Act, the only question which can arise is whether the fine was legally imposed. Section 9 contains an express provision that the fines thereby imposed shall not be remitted or refunded.

sions the courts have been careful to point out that unless manifestly wrong or wholly arbitrary or capricious, the decision of the Secretary is final. *Lloyd Sabaudo Societe Anonima per Azioni* v. *Elting,* 55 F. (2d) 1048 (C. C. A. 2d), now pending before this Court on certiorari, No. 48, present term; *North German Lloyd* v. *Elting,* 48 F. (2d) 547 (C. C. A. 2d); *United States* v. *Compagnie Generale Transatlantique,* 26 F. (2d) 195 (C. C. A. 2d); *New York & Porto Rico S. S. Co.* v. *United States,* 52 F. (2d) 980 (S. D. N. Y.); *Lamport & Holt* v. *Elting,* 51 F. (2d) 1057 (S. D. N. Y). Like conclusions have been reached with respect to the provisions imposing penalties upon steamship companies for failure to detain on board or to deport alien seamen, after notice from the Secretary of Labor.[12] *Denholm Shipping Co.* v. *Elting,* 55 F. (2d) 422 (S. D. N. Y.); *Lloyd Royal Belge Societe Anonyme* v. *Elting,* 55 F. (2d) 340 (S. D. N. Y.); Cf. *The Presidente Wilson,* 56 F. (2d) 742 (C. C. A. 2d).

It is true that in some cases the courts have allowed the recovery of fines imposed by the Secretary, but these decisions were either based upon the holding, express or implied, that the action of the Secretary was arbitrary (*Svenska Amerika Linien*

[12] See Section 10 of the Immigration Act of 1917, as amended by Section 27 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 146) and Section 20 (a) of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 167).

v. *Elting,* 46 F. (2d) 178 (S. D. N. Y.); *Spanish Royal Mail Line Agency, Inc.,* v. *United States,* 45 F. (2d) 404 (S. D. N. Y.); *Clyde S. S. Co.* v. *United States,* 33 F. (2d) 343 (S. D. N. Y.)), or that there was an absence of facts upon which the power of the Secretary to act depended. (*Compagnie Generale Transatlantique* v. *United States,* 51 F. (2d) 1053 (C. C. A. 2d); *Dollar Steamship Line* v. *Elting,* 51 F. (2d) 1035 (C. C. A. 2d); *Sinclair Navigation Co.* v. *United States,* 32 F. (2d) 90 (C. C. A. 5th); *Dollar Steamship Line* v. *Hyde,* 23 F. (2d) 911 (C. C. A. 9th); *Compagnie Francaise De Navigation a Vapeur* v. *Elting,* 19 F. (2d) 773 (C. C. A. 2d); *Pan-American Petroleum & Transport Co.* v. *United States,* 28 F. (2d) 386 (E. D. La.); *W. & C. T. Jones S. S. Corp.* v. *Hamilton,* 255 Fed. 799 (E. D. Va.); *Cunard S. S. Co.* v. *Stranahan,* 134 Fed. 318 (C. C. S. D. N. Y.).) In none of these cases was it suggested that the court could consider *de novo* the evidence before the Secretary and reverse his decision where it took a different view of the evidence.[13]

Consequently, the respondent is not entitled to recover, unless a construction of the statute is

[13] There are one or two District Court cases which seem to proceed upon the assumption that the court may determine for itself whether, on the facts, the fine should be imposed. *New York & Porto Rico S. S. Co.* v. *United States,* 58 F. (2d) 827 (S. D. N. Y.); *Bermuda and West Indies S. S. Co.* v. *Elting,* 45 F. (2d) 411 (S. D. N. Y.). If this is what these decisions hold they can not be supported.

adopted which we believe is unwarranted, and then only if it is shown that the Secretary abused his statutory authority, which fact does not appear.

III

THE REFUSAL OF THE SECRETARY TO REMIT THE FINE WAS NOT ARBITRARY OR CAPRICIOUS

Assuming that the courts possess authority to review, within the limits above described, the action of the Secretary in refusing to remit the fine, the facts in the instant case demonstrate clearly that the Secretary's action was neither arbitrary nor capricious.

At the time of foreign embarkation the alien Funk represented to the respondent that he was exempt from the quota restrictions as an "alien visiting the United States * * * temporarily for business." The purported business was the collection of an inheritance. The respondent made no inquiry or investigation with respect to Funk's claim, but relied solely upon his representations and upon his possession of an American consular visa bearing the notation, "purpose to proceed to the United States on business only." Apparently the alien's representations to both the respondent and the Consul were fraudulent.

Upon arrival in the United States the Special Board of Inquiry ascertained—

> (1) that Funk was without money or a return ticket, (2) that his passage to this

> country had been paid by a relative in the United States, (3) that there was no reason why he could not permanently remain here, (4) that he claimed he had come to collect an inheritance of $400, but it cost him nearly half that amount to come to the United States, and he had no documentary evidence whatever to support his claim.

Upon these facts it was held that Funk was not a temporary visitor for business, and therefore that he was subject to the quota. Since the applicable quota was exhausted, he was excluded. No one questions the propriety of his exclusion.

Thereafter the Secretary notified the respondent that the facts indicated its liability to a fine for bringing to the United States an inadmissible alien, and the respondent was given sixty days in which to have a hearing. Within this period the respondent filed a protest against the imposition of the fine on the ground that it had accepted Funk for transportation in good faith in reliance upon his representations and his possession of the consular visa with the notation thereon. After a consideration of the protest and of the findings of the Special Board of Inquiry the Secretary [14] found that the respondent had not taken "any real precaution against the transportation of an inadmissible alien," and that the inadmissibility of the alien

[14] For the applicable administrative procedure, see Immigration Rules of May 1, 1917 (August, 1922, Edition), Rule 28.

"could have been determined prior to his embarkation, by the exercise of a reasonable amount of diligence." (R. 8, 9.)

Mere recital of the foregoing would seem conclusively to negative the contentions that the Secretary denied a fair hearing or that his decision was not based upon any substantial evidence or that it was in any way an abuse of his discretion. Although the statute required that the respondent exercise reasonable diligence, the burden of proof being upon it to establish that fact to the satisfaction of the Secretary, the facts disclose that it made no independent inquiry of any kind as to the truth of the alien's claim to be a temporary visitor. Had such inquiry been made the respondent would have undoubtedly discovered the same facts which were disclosed by the Special Board of Inquiry, facts which clearly establish that the alien was not what he claimed to be. On this state of proof the Secretary could reasonably find that the respondent could have ascertained, by the exercise of reasonable diligence, that the alien was not coming to the United States for the purpose of collecting an inheritance, as he claimed, and hence that he was inadmissible. As a matter of fact, it is not apparent what other conclusion the Secretary could reasonably have reached on the evidence before him.

The respondent contends that it was excused from making an independent inquiry as to the alien's status in view of the alien's possession of a consular visa which indicated that he was exempt

from the quota restrictions. This contention is unfounded. Although visas had been issued to prospective immigrants by United States consular officers, pursuant to consular instructions,[15] for a considerable period previously, it was not until the Immigration Act of 1924 that the immigration laws required the issuance of consular visas to aliens seeking admission to this country. The departmental instructions in force at the time of the transportation of the alien involved in the instant case (General Instruction Consular No. 839, pp. 38–39, *infra*) expressly stated that consular officers were "not authorized to assume abroad the functions vested by law in the immigration officers of the United States of deciding upon the admissibility of aliens," and in express terms required the consul to issue a visa, if the alien insisted, *regardless of the consul's view as to the alien's admissibility.*[16] In view of these definite provisions of the regulations, if not otherwise (see footnote 2, p. 11, *supra*), it is apparent that respondent was wholly unwarranted in relying upon the visa as establishing the alien's

[15] See the "Joint Order [of the Departments of State and Labor] requiring passports and certain information from aliens who desire to enter the United States during the war," of July 26, 1917. This order was confirmed and continued in existence by Section 31 of Executive Order 2932 of August 8, 1918, which latter order remained in force until superseded by Executive Order No. 4027 of June 14, 1924.

[16] These instructions were in force until July 12, 1924. Section 2 (f) of the Immigration Act of 1924 (U. S. C., Title 8, Section 202 (f)) provides that no immigration visa shall be issued by a consular officer unless it appears to him that

status as an immigrant exempt from the quota restrictions.[17]

Nothing in the applicable statutes or regulations, or otherwise, supports the contention that the alien's possession of a consular visa dispenses with the express requirement of the statute that steamship companies use reasonable diligence to ascertain whether or not the alien is admissible. See *North German Lloyd* v. *Elting*, 48 F. (2d) 547, 550 (C. C. A. 2d).

We submit that not only did the Secretary act upon substantial evidence but that it affirmatively appears that the respondent failed to use reasonable diligence in ascertaining whether or not the alien was admissible. Accordingly, the courts below were in error in holding that the respondent was entitled to recover the fine.

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the alien is admissible. But Section 2 (g) (U. S. C., Title 8, Sec. 202 (g)) provides that:

"Nothing in this act shall be construed to entitle an immigrant, to whom an immigration visa has been issued, to enter the United States, if, upon arrival in the United States, he is found to be inadmissible to the United States under the immigration laws."

The consular instructions issued since the 1924 Act have called attention to the fact that the visa is not a guarantee of admission and have directed the consular officers to call this fact to the attention of the steamship companies and their agents. See General Instruction Consular No. 926, Diplomatic Serial No. 273, dated June 12, 1924, p. 48; *ibid.*, dated March 23, 1929, Par. 178. See also House Rept. No. 350, 68th Cong., 1st Sess., p. 10.

[17] The visa in the instant case should be distinguished from the reentry permit involved in *Spanish Royal Mail Line Agency, Inc.*, v. *United States*, 45 F. (2d) 404 (S. D.

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed and the case remanded to the District Court with instructions to enter judgment for the petitioner.

Respectfully submitted.

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N. Y.), which was an action to recover a fine imposed under Section 9 of the 1917 Act, as amended, for bringing to the United States an illiterate alien. The court held that the reentry permit, which had been issued to the alien by the Commissioner General, imported, as a matter of law, that the alien had been previously legally admitted, which fact in turn imported that at the time of his original entry the alien was able to read. The court further held that the Secretary's decision that the steamship company had failed to exercise "reasonable precaution," where it had accepted the alien for transportation in reliance upon his possession of the permit without investigating whether he was able to read, was arbitrary.

APPENDIX

STATUTES AND REGULATIONS

The Quota Act of May 19, 1921, c. 8, 42 Stat. 5, provided in part:

> SEC. 2. (a) That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following, and they shall not be counted in reckoning any of the percentage limits provided in this Act:
> * * *
>
> (4) aliens visiting the United States as tourists or temporarily for business or pleasure;
>
> * * * * *
>
> (d) When the maximum number of aliens of any nationality who may be admitted in any fiscal year under this Act shall have been admitted all other aliens of such nationality, except as otherwise provided in this Act, who may apply for admission during the same fiscal year shall be excluded:
> * * *

Section 3 of the Act of May 11, 1922, c. 187, 42 Stat. 540, amended the Quota Act of 1921 by adding thereto the following provision:

> SEC. 6. That it shall be unlawful for any person, including any transportation company other than railway lines entering the

United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien not admissible under the terms of this Act or regulations made thereunder, and if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. No vessel shall be granted clearance papers pending the determination of the liability to the payment of such fine, or while the fine remains unpaid; except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine. Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such person, or the owner, master, agent, or consignee of the vessel prior to the departure of the vessel from the last seaport in a foreign country or insular possession of the United States.

The Quota Act of 1921, as amended, expired on June 30, 1924, and Section 6 of that Act was replaced by Section 16 of the Immigration Act of 1924, c. 190, 43 Stat. 153, 163 (U. S. C., Title 8, Sec. 216), which provides:

> SEC. 16. (a) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant.
>
> (b) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person, or transportation company, or the master, agent, owner, charterer, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, and in addition a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. No vessel shall be granted clearance pending the determination of the liability to the payment of such sums, or while such sums remain unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of an amount sufficient to cover such sums, or of a bond

with sufficient surety to secure the payment thereof approved by the collector of customs.

(c) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such person, and the owner, master, agent, charterer, and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a nonquota immigrant.

Immigration Rules of February 1, 1924:

Rule 9, subdivision E.—Aliens visiting the United States as tourists or temporarily for business or pleasure for a period not to exceed six months shall not be subject to the provisions of section 2 (a) of said Act of May, 1921, as amended, nor shall they be counted in reckoning any of the percentage limitations provided in said act.

General Instruction Consular, No. 839, issued by the Secretary of State on July 14, 1922, and in effect until June 12, 1924, provided in part:

SEC. 12. * * *. In the work of alien visa control it is the desire of the Department that consular officers shall be of the greatest possible assistance to the Bureau of Immigration, Department of Labor. Consular officers are, however, not authorized to

assume abroad the functions vested by law in the immigration officers of the United States of deciding upon the admissibility of aliens after arrival at an American port.

Nevertheless, in order to prevent or avoid so far as possible hardships and dangers involved in deportation under present conditions, the consular officer to whom a passport is presented for visa shall endeavor to ascertain as far as practicable whether the holder is a member of any of the classes excluded from the United States by the provisions of section 3 of the immigration act of February 5, 1917. If an alien, after submitting to a consular officer the alien's declaration on Form 228, appears in the consul's judgment to fall clearly under one of the classes liable to exclusion, the consul shall so advise the alien, informing him of the serious risk he is taking in attempting to enter the United States and acquainting him with the probability that he will be excluded from the United States and deported. If the alien nevertheless insists upon proceeding, the consular officer shall visa his passport if it is valid, and if there is no other reason for refusal.

* * * * *

General Instruction Consular No. 926, Diplomatic Serial No. 273, issued by the Department of State on March 23, 1929, provides:

178. It will be noted in section 2 (*g*) of the act that possession of an immigration visa does not entitle an immigrant to admission into the United States if he is found to be inadmissible under the immigration laws upon arrival at a port of entry of the United States. The immigration visa carries a statement to this effect. Consuls will

see that all immigrants are fully informed in this regard and also that steamship companies and other agents of transportation understand this provision of the law. It adds another cogent reason for diligence and care and the Department consequently expects that consuls will not issue immigration visas to persons not entitled under the laws to receive them.

A provision substantially identical to paragraph 178, above quoted, has been included in the consular instructions consistently since the enactment of the Immigration Act of 1924. See General Instruction Consular No. 926, Diplomatic Service No. 273, dated June 12, 1924, p. 348.

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